IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

THE WEST SIDE IRRIGATING COMPANY, a Corporation, *Appellant,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	No. 2866.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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Attorney for Appellant, North Yakima, Washington.

REPUBLIC PUB. CO. NORTH YAKIMA

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STATEMENT OF THE CASE.

The Yakima River is a considerable stream, which has its source in the heart of the Cascade mountains, and flows into the Columbia River. It is about 130 miles in length. It flows through several of the principal valleys of Central Washington;

one of the most fertile of these valleys is that known as the Kittitas Valley.

This valley is naturally arid sage brush land. The valley is divided into two parts; the West Kittitas Valley and the East Kittitas Valley, the West Kittitas Valley being on the west side of the river and the East Kittitas Valley on the east side. The land in the West Kittitas Valley is the most fertile of the two, and there is no more fertile land, with the proper amount of water, in the world.

Even before this region was penetrated by the Northern Pacific Railway, this valley had attracted many settlers, and the year of 1889 found all of its land in the hands of individual owners. The water in the Yakima River, fed as it is from the snows of the mountains, is of great volume, and as it comes from the melting of the snows, the river is particularly full during the months of May, June and July.

In the year 1889 but little of the water had been used for irrigation. The struggling settlers, prior to that time, had not been financially able to take water in any great quantities from this river, but had contented themselves with using water from the creeks flowing through the valleys into the river; but as the Northern Pacific Railway brought a market, so did it bring increased financial ability and assistance, and in this year of 1889 the settlers of the West Kittitas Valley joined hands and began the irrigation and development of their lands in a much more pretentious way than theretofore.

They discovered that seven thousand acres of most excellent land could be irrigated by a canal taken from the Yakima River. They put their means together and began the construction of the canal known as the West Side Irrigating Canal, which canal is now vested in the West Side Irrigating Company. It was begun as a community canal and has always been operated and maintained as such. It was planned and built from the start to irrigate this seven thousand acres of land owned by its builders. Each man that helped to build it contributed his mite to get water to irrigate land which he actually owned.

The flumes constructed in 1889 to 1891, when the canal was finally completed, were of the identical dimensions of the present canal, and long prior to the year of 1905 this seven thousand acres of land watered by this canal had been placed in cultivation and the water had been applied to a beneficial use to the full amount of the carrying capacity of the canal.

On June 17, 1902, Congress passed an act known as the Reclamation Act, and the bureau having in charge the execution of this act cast about over the country for projects that would afford an opportunity for the development contemplated by the act. It is not to be wondered at by those acquainted with the Yakima Valley that the governmental eye rested wistfully upon that favored land. After several years' investigation the Government, in 1905, dis-

covered three facts respecting the Yakima Valley, and the Yakima River.

First, that there was remaining a large amount of land in the Yakima Valley susceptible of being reclaimed by water.

Second, that all of the waters naturally flowing in the Yakima River had been fully appropriated, and were already being beneficially used on the lands of the valley.

Third, that at the head water of the Yakima River and its tributaries, were many lakes and reservoir sites where water could be cheaply stored to irrigate all of the lands not reclaimed by the natural flow of the river, that such water could by any possibility be made to cover.

This condition seemed to appeal to this governmental Reclamation agency. It was easily within the ability of private investors to take the water from the river to irrigate lands along its banks, but it was not within the financial power of private persons or corporations to undertake the gigantic task of storing these waters. The Government saw the opportunity and realized that this was really an undertaking that must have been in the Congressional mind when the Reclamation Act was passed.

Here were fertile lands in the valley, awaiting the magic of water to astonish the world with their fertility; here were reservoirs already made that needed by to be dammed and drained to furnish

the supply of water, and back of these waters were the eternal snows and glaciers of the Cascades to more than keep them filled.

In and prior to this year of 1905 there had been legislation in the state of Washington, and Supreme Court decisions determining that rights could be obtained in streams for the purposes of using the water for irrigation. These rights could be obtained in two ways: First, by actually diverting water and putting it to a beneficial use. Second, by filing certain Notice of Appropriation of a certain amount of water, with the county auditor in any county in which a stream was situated, in which appropriation was claimed.

When the Reclamation Service, in 1905, began seriously to consider entering the irrigation field in the valleys, it found that the paper appropriations of the water in the Yakima River and its tributaries, added to the actual appropriations, many times exceeded the natural flow of the stream. It also discovered that while much of the water covered by these paper appropriations was not used, yet all of the available natural flow of the Yakima River actually was put to a beneficial use in irrigating land.

The Reclamation Service found it attractive to come into the field under these conditions; that is to say, it found it attractive to come into the valley to irrigate and develop these lands then unirrigated by depending solely upon stored water to irrigate

them. And the Government did so enter the field of irrigation in the Yakima Valley.

It was necessary, however, for the Government in order to irrigate these lands through storage, to use the Yakima River to carry the water to the intake of its distributing canals. In order that it could protect itself from having the stored water that it put in the river taken out for purposes other than that which the Reclamation Service intended, it was necessary to settle and determine the amount of water of the said River already appropriated, and to obtain releases from the paper appropriations. Therefore, the Reclamation Service sent its agents throughout the Yakima Valley to confer with claimants to the water of the Yakima River and obtain a statement as to the amount of water claimed by each user or appropriator.

Thus it was that in the spring of 1905 one T. A. Noble, district engineer of the Reclamation Service, visited the Kittitas Valley for the purpose of conferring with the water users in that valley in reference to their claims to the natural flow of the water of the Yakima. As he tells us in his testimony (R. pp. 187 and 188) he asked for a public meeting through the Commercial club of the water users of the whole Valley, and he told them that before the Government would undertake a project in the Valley that it was necessary that the water rights in the natural flow of the stream should be confined to a quantity that would not exceed the flow of the stream.

In conformity with the request of the Government the various corporations and persons taking water from the River did, during the year 1905, make statements in writing as requested, the Appellant among others. The one made by the Appellant is in words and figures as follows:

"The West Side Irrigating Company, to PUBLIC Between the Appropriator Taking Water from the Yakima River and Its Tributaries.

WHEREAS, The Reclamation Service of the United States has been requested to investigate the water resources of the Yakima Water Shed with a view to the further development and increase of irrigation therein, under the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, and whereas the officers of the Reclamation Service in preliminary investigation have found that in *all the low water flow of the Yakima River and its tributaries has been appropriated* and is now being diverted by the various canals within said watershed and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season, and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima River and its tributaries is entitled be first definitely ascertained and agreed to, and, whereas, the undersigned claim certain quan-

tities of water from the Yakima River and its tributaries and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

SCHEDULE.

Cubic Feet per Second.		
April to August Inclusive.	September.	October.
80	80	34

Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through Federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agreed to limit and does *limit its respective rights of appropriation* from said Yakima River and its tributaries to the above specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agree-

ments of this form duly executed by or on behalf of such proportion of the claimants of the waters of theYakima River and its tributaries as shall be satisfactory to the Secretary of the Interior. In witness whereof, the undersigned has caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed, by authority of its board of directors, heretofore duly made and entered this 21st day of October, 1905.

THE WEST SIDE IRRIGATION COMPANY,
By MITCHELL STEVENS,
Vice President."

On the 21st day of October, 1905, when this statement was signed by Mitchell Stevens, Vice President of the said company, the West Side Irrigating Canal had been furnishing water to irrigate the lands of the men who had constructed it from as far back as the year of 1889, continuously. It was built, as heretofore has been stated, to irrigate seven thousand acres of land, being the land susceptible of irrigation, owned by the men who had constructed it, and all of this amount of land had been in cultivation—not every year, however, because at times when the prices of crops were low, the land was not farmed to its full extent, and sometimes for one reason, sometimes for another, a farm or so was not farmed during a particular year. But the canal had reclaimed seven thousand acres of first class land.

The flow in the canal never had been measured at its intake, when the said statement was signed by Mr. Stevens. There had always been plenty of water in the river and the rights of the appellant had never been questioned. The canal ran along the bank of the river in the gravel for a number of miles before it began to reach irrigable land, and a large part of the water ran directly back into the river through this gravel.

The water was measured to persons entitled to water from the canal through a home made device adopted by these farmers without any knowledge of engineering or without the assistance of any engineer, and the water of each shareholder in the canal was measured to him through this device. These farmers had never heard of the cubic foot of water and they had adopted the idea of measuring water by inches without any definite idea even of the pressure.

Under the system of measurement by which the appellant was apportioning the water of its canal on the 21st day of October, 1905, it was furnishing four thousand of such inches to its water users, and it took four thousand of such inches measured at the intake of the lateral ditches of its various water users, to irrigate their seven thousand acres of land.

Mr. E. I. Anderson, a very competent irrigation engineer, who testifies in this case, has concisely given to us a description of the method of measurement in the following language:

"The West Side Irrigation Company's module for the (56) measurement of water consisted of a box, entering one side of which an orifice has been cut, the width or depth of that orifice being about four inches; the bottom of the orifice being about three inches above the bottom of the box and the top of the orifice being five inches below the top of the box, making the total depth of the box twelve inches. In the operation of those for the distribution of water, they divert the water from the canal into what they term the draw-box, which is essentially a rectangular box, that is, in cross-section it is rectangular and extends in length sufficient to extend through the bank of the ditch, having a head in the main canal, and the amount of water that goes into the draw-box is regulated by just a sliding gate which works upwards. The function of that draw-box is simply to measure the amount of water to this measuring-box I have heretofore described, and in the operattion of this canal they admit an amount of water into this measuring-box until the water comes to the top of the box. The dimensions of the box vary according to the amount of the water that they have to discharge, those discharging a larger quantity being larger in size, cross-section, than those having a small quantity, the idea being to maintain the water at the top of this measuring-box in as quiet a condition as possible." (R. pages 9 and 10.)

When asked to reduce four thousand inches measured according to this module to second feet Mr. Anderson answered that the four thousand

inches measured under these farmers' way of measuring, converted into second feet, would equal 90 4-10 second feet (R. P. 111.) Thus, on the 21st day of October, 1905, the users of water from the West Side Irrigating Canal were in the aggregate receiving 90 4-10 second feet of water at the intakes of their various laterals.

Throughout the Pacific Coast, prior to the advent of the Reclamation Service, when we spoke of the measurement of water, we talked of it in inches; or rather, miners' inches, and it would be miners' inches under a six inch pressure or under a four inch pressure generally, and engineers have come approximately to an estimate of an equivalent of miners' inches to cubic feet; thus, approximately, a cubic foot is said to equal fifty inches of water under a four-inch pressure.

Now when these farmers and Mr. Noble had their conference Mr. Noble talked in cubic feet per second of time, while the farmers talked in inches, and during the conference, according to Mr. Noble, whose testimony is to be found in the record, the farmers representing the West Side Irrigating Company told him that they needed four thousand inches of water to irrigate their lands. They naturally meant the only inch that they understood, which was the inch provided for the distribution of the water in their canals, hereinbefore described by Mr. Anderson.

No description was given to Mr. Noble, or so far

as the record appears, to any other officer of the Reclamation Service, of the character of the inch which the farmers referred to, and the officers of the Reclamation Service jumped at the conclusion that it was the usual inch known to engineers as a miners' inch, under four inches pressure, measured from the center of the orifice. Such an inch as this would make fifty of such inches equal a cubic foot, or the four thousand inches equal eighty cubic feet; but as has been stated before, the inch as used by the appellant was a different inch from this inch obtained by pressure of four inches, from the center of the orifice, and hence the farmers were mistaken in taking the word of the engineer of the Reclamation Service that these four thousand inches measured out to them by the peculiar measurement of the appellant equalled eighty cubic feet, and the officer of the Reclamation Service was mistaken in assuming, without examining into the matter, that the measurement of appellant was the usual measurement under four inches pressure, from the center of the orifice.

When this statement was therefore signed by Mitchell Stevens, as Vice President of the Appellant, he supposed, and had reason to suppose, that the eighty cubic feet was equal to four thousand inches according to the peculiar measurement of appellant, and he assumed, as he had a right to assume, nothing having been said to the contrary, that the appellant was to measure this water as it always had been measured at the intake of the water users'

laterals. The evident mistake was, First, that the actual inch measureed by the appellant's module was not a measurement under four inches pressure from the center of the orifice, and that instead of running eighty cubic feet per second of time, four thousand of such inches as appellant measured out to its users of water, was ninety and four-tenths cubic feet. Second, there was a misunderstanding as to where the water was to be measured. The appellant never had measured any water at its intake, but always had measured it out to its users at the intake of their laterals, and the agents of the United States knew this, as they had agents on all of these canals prior to the making of this agreement. The appellant corporation went right on after this statement was signed by Mr. Stevens, using the water it had always used, until it was enjoined from so doing in this proceeding.

The evidence shows that the users of water from this canal need this four thousand inches measured to them at their intakes, or ninety and four-tenths second feet. The canal before it reaches the distributing laterals loses by seepage, through the gravelly banks of the canal, as it is constructed by the river, about fourteen second feet. Thus, in order to give the users of water from appellant's canal the water needed by them, and the water which they had always been using, there would have to be 104 4-10 second feet taken in the canal at its intake; whereas, the decree of the court allows only eighty second feet at the intake, and taking from the 80 second feet the

seepage of 14 second feet that runs back into the river, and which the Reclamation Service gets the benefit of, only leaves 66 second feet to distribute among the users of water in this canal, which is entirely insufficient for the needs of the seven thousand acres dependent upon this canal for irrigation.

The lower court decreed that the water should be measured practically at the intake of the appellant's canal, and that it is only allowed 80 cubic feet per second at this point, from and after July 1st, to September 30th; whereas, appellant contends that if this statement has any effect upon its right to take water from the river that it should not in equity and good conscience, be prevented under it from taking less than 104 4-10 second feet from the river if measured at the Gordon flume and that any other construction would do violence to the rights of these appellants and their intentions in making this statement, for the convenience of the government.

No questions relating to the introduction of evidence are raised, and the questions to be considered by the court are whether or not the complaint states a cause of action; whether the court has jurisdiction, and, in view of all of the facts, if a cause of action is stated, and that the court has jurisdiction, whether or not the alleged contract was enforceable on account of mistake of the parties, and if enforceable what the proper construction thereof is. These matters will be more particularly set forth in the discussion of the specifications of error in the argument.

ASSIGNMENT OF ERRORS ON APPEAL.

Now, on the 17th day of August, 1916, came The West Side Irrigating Company, a corporation, by its solicitor, H. J. Snively, and says that the decree rendered and entered in said cause is erroneous and against the just rights of said The West Side Irrigation Company for the following reasons:

First. Because the Amended Complaint upon which suit decree was rendered does not state or set forth any facts or equities entitling the complainant to any equitable relief.

Second. Because the complainant is not authorized by any act of Congress or any other lawful authority to maintain this suit or any suit of this character.

Third. Because the United States is not vested by law with any authority, nor is the Secretary of the Interior, nor the Attorney General of the United States, to maintain a suit of this character, the United States not being a party in interest and the benefits of said suit accruing entirely to private interests.

Fourth. That said suit was brought without any legally lawful authority and it was erroneous to enter any decree therein for that reason.

Fifth. That the record shows that the court was without jurisdiction of any kind or character to try, hear or determine this controversy, or enter any

decree therein, other than a decree of dismissal for the reason that no property or other right of the United States of America was involved in this suit and Said United States of America is not vested with any authority, power or right to engage in litigation of this nature.

Sixth. Because the evidence showed that the officers of The West Side Irrigating Company had no authority to enter into the alleged agreement dated the 21st day of October, 1905, upon which the decree of the court in this case is founded.

Seventh. Because the evidence showed that the said alleged agreement upon which the decree in this cause is founded purporting to be entered into on the 21st day of October, 1905, was made without any authority upon the part of the said corporation and was without the powers of said corporation. The Articles of Incorporation of said corporation only authorized the said corporation to carry and distribute water and to in no manner sell or dispose of water, or own water. Said alleged agreement was therefore null and void.

Eighth. Because the evidence showed that said alleged agreement was not an agreement, had no mutuality, was without any consideration, and was uninforceable.

Ninth. Because the evidence showed that said alleged agreement was indefinite and uncertain and founded upon a mistake in this, to wit: The officers of The West Side Irrigating Company who executed

the said alleged agreement believed that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of water under the measurement in use by them; the evidence showed that they measured their water in a certain way by inches under pressure and they were informed by the engineers of the complainant, who had technical knowledge upon the subject, that eighty (80) cubic feet of water per second of time was equivalent to four thousand (4,000) inches of water according to the measurement of the said corporation in use at that time, and having no technical knowledge upon the subject, they accepted this statement of complainant's engineers, and instead of putting into said alleged agreement four thousand (4,000) inches of water under pressure, as used by said irrigating company at that time, eighty (80) cubic feet per second of time was inserted; the evidence showed that the said officers intended to reserve all of the water which had been provided for the use of the lands under said irrigating company's canal, which they knew to be four thousand (4,000) inches, as measured by the said company, under pressure; and the said officers only executed said alleged agreement upon the supposition and belief that said eighty (80) cubic feet per second of time was equivalent to said four thousand (4,000) inches as measured by said company at that time under pressure, whereas, in truth and in fact, it is shown from the evidence that eighty (80) second feet is not the equivalent of four thousand (4,000) inches as

measured by said company, but that ninety and four-tenths (90.4) cubic feet per second of time is the equivalent thereof.

Tenth. Because the evidence showed that the intention of the officers of the irrigating company was to release only that portion of the waters of the said river not required to irrigate the lands of the stockholders of said company, but that it was the intention of the said officers to reserve all of the water required to for the full and complete irrigation of the lands of the stockholders of the said company. It is shown from the evidence and admitted facts in the case, that under the decree of the Court as rendered and entered in this cause that the said eighty (80) second feet of water is insufficient to fully irrigate the lands of the stockholders of the said company or to furnish the amount of water to which the said stockholders are entitled in virtue of their several appropriations and rights. That it was manifestly not the intention of the said officers and certainly not within their power or authority to release to the United States for the irrigation of other lands in which their stockholders are not interested, water required for the irrigation of said stockholders' lands.

Eleventh. That said alleged agreement does not provide a place for the measuring of said water, and the evidence showed that the said defendant corporation had no measuring apparatus at the place that it took water from the Yakima River, but that

it measured the water through boxes placed in the service laterals along the ditch; those service laterals measured water by inches under pressure. That the evidence showed that it was never contemplated by any of the parties to said alleged agreement that the water taken from the river by said irrigating corporation should be measured at the intake; that the evidence showed that the defendant corporation's canal for a long distance runs along the banks of the Yakima River through gravel, and that a large portion of said water runs back into the river before it reaches any of the distributing laterals. That when a full head of water is running in said canal, at least twenty (20) cubic feet per second of time of the said water runs back into the Yakima River, and never enters the distributing ditches of the defendant corporation; that thus, instead of getting even eighty (80) cubic feet of water per second of time, the defendant corporation actually gets only sixty (60) cubic feet or less, of water per second of time.

Twelfth. Because in view of the uncertainty of said alleged agreement as to the place of measurement and the evident intention of the parties as shown by the evidence and the mistake made in transposing the four thousand (4,000) inches as measured by said corporation into eighty (80) second feet, even if said agreement otherwise would be regarded as valid by the Court, the equities of the case as shown by the evidence and record does not authorize or uphold any other decree than a decree

providing for the actual distribution from the Yakima River of water sufficient for the irrigation of the lands of the said stockholders of said corporation; that no other decree would be just and that such a decree alone would carry out the intention of all parties; that is to say, the decree, in the event of said alleged agreement being held valid otherwise should provide that there should be measured out to said corporation sufficient water to irrigate the lands of the stockholders thereof, to wit, about seven thousand (7000) acres of land, in the manner and quantity in which they had been using such water, and in which they contemplated using it and that over and above this any right to water out of the Yakima River is waived by said agreement. That it is an injustice to the stockholders of said corporation to be arbitrarily cut down in the use of water below their requirements.

Thirteenth. Because the evidence failed to show that the United States performed the conditions of said agreement.

Fourteenth. Because the evidence failed to show that the complainant had any right or claim against The West Side Irrigating Company.

Fifteenth. Because the evidence showed and the court found, that the defendant corporation is only interested in the agency and that the real parties in interest in the water carried by said corporation are the owners of the land. That the use of said waters is appurtenant to said land. That the said corpora-

tion had no right to release any interest in said land; that said land is generally owned by husband and wife under the laws of the State of Washington; that the laws of the State of Washington covering the rights of husband and wife are known as community property laws, and section 5918 of Remington and Ballinger's Annotated Codes and Statutes of Washington is as follows:

> "The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife; Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon. (Cd. '81, 2410; 1 H. C. 1400.)"

and under said provision any conveyance of property not made by a wife and husband jointly is void according to the decisions of the Supreme Court of the State of Washington. That if said agreement is given effect, as it is by the decree complained of, the effect will be to transfer the interests of the

wives of the owners of said community property in real estate in contravention to the above Statute.

Sixteenth. Because the evidence showed that the act of the Trustees and officers of the defendant corporation in signing the said alleged agreement was repudiated on the second day of January, 1906, and that at that time the United States Reclamation Service had not expended any money in virtue of said alleged agreement, or performed any of its conditions. That under the evidence the said alleged agreement was not even prima facie valid, but was invalid; that the Court erred in holding that notice of its repudiation had to be given to the reclamation service. Said officers were agents only of the corporation and the *Court erred in holding that the United States was entitled to treat said officers to act and bind the stockholders.*

Seventeenth. Because the evidence showed that the alleged agreement, if properly construed by the larned District Judge, is inconstruable and should not be enforced in a court of equity.

Eighteenth. Because it is shown by the evidence that complainant is not entitled to any relief whatever in a court of equity.

Nineteenth. Because the evidence fails to show that the United States is injured or that any interest represented by it is injured by the defendant corporation under the quantity of water claimed by it from the Yakima River, or that the United States can put said water to a beneficial use.

Twentieth. Because the evidence showed that the complainant is in a court of equity, praying specific performance of an alleged agreement without showing any consideration therefor.

Twenty-first. Because the evidence failed to show that Mitchell Stevens, Vice President of The West Side Irrigating Company, had power to bind said company or that his act was in any manner authorized by said company.

Twenty-second. Because said alleged agreement was not executed under the seal of said company by any authorized officer of said company, or by the authority of the stockholders thereof.

Twenty-third. Because the Court erred in holding that eighty (80) cubic feet per second is conceded to be the equivalent of four thousand (4000) inches as measured by the defendant corporation.

Twenty-fourth. Because the *Court erred in finding from the evidence that the object in purpose of the Government was to ascertain and fix the quantity of water diverted from the river and not the quantity actually used for irrigation.* All of the evidence taken together, in view of the surrounding conditions of the parties will show that in making this alleged agreement certainly the defendant corporation had in mind the quantity of water actually used for the purpose of irrigation and not the quantity diverted from the river.

WHEREFORE, The West Side Irrigating Company prays that said decree be reversed and that

said court may be directed to enter a decree dismissing the Bill of Complaint or to modify the same to the end that the stockholders of said Irrigating Company shall be awarded the amount of water which they require for the full irrigation of all their lands under the canal of the said irrigating company.

ARGUMENT.

1.

The first assignment of error raises the question as to whether or not the complaint sets forth a cause of action for equitable relief. It is well established by the following authorities that when the United States asserts a pecuniary demand against a citizen or seeks to protect its proprietary interests, its rights are measured by the same rules as those of a private litigant. *United States vs. Midway Northern Oil Co.*, 232 *Fed.* 619; *Sweet vs. United States*, 228 Fed. 421; *Chase vs. United States*, 222 Fed. 593.

The same principle applies therefore, to this action as if it were between individuals.

It has been well established by the courts in decisions too numerous to mention, that equity will not enforce remedies to protect speculative rights; and that illustration of the application of this principle is to be found in the case of *Coulee Livestock Co. vs. Pluvius Development Co.*, 75 Wash. 109. The court in that case announces the following rule:

> "Equity will not enjoin the diversion of waters required for irrigation where the plaintiff sustains only nominal damages; and where the result is problematical, and it is impossible to ascertain with any degree of certainty the effect of the contemplated diversion, and neither party will lose any rights, the action may be held in abeyance until such time as the damages, if any, can be ascertained by dependable facts."

The complaint in the case at bar shows facts from which it might be inferred that some time in the future, if Congress is willing, that the water of the Yakima will all be utilized by the Reclamation Service, together with the water capable of being impounded. The complaint does not show that the United States, or any one in privity with it has been deprived of the use of water, and it does not show that present injury has been caused to it or anyone in privity with it. It comes squarely within the rule laid down in the above entitled case, and measured by this rule it is found wanting. Not a single fact is alleged from which present injury can be even remotely inferred.

> "The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged, from which the court can reasonably infer that such would be the result. *Cruickshank vs. Bidwell*, 176 U. S. 377."

2.

The second, third, fourth and fifth assignments,

in one way or another raise the same question of law, and will be argued together.

The Reclamation Act itself confers special authority upon the Secretary of the Interior to institute suits for the purposes of said act. The whole subject is covered by Section 7 of said act, which is as follows:

> "Sec. 7. (Condemnation for rights, etc.) that where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

This is exclusive of any other authority in the premises, under the well-known principle of construction that when authority is expressly given it excludes power by implication. It is hard to conceive that Congress intended to give the Secretary of the Interior authority to institute actions to defend the irrigation rights sold by the Reclamation Service. This would be certainly undertaking more

litigation than was contemplated in the Reclamation Act, or by any general authority conferred upon the Secretary of the Interior.

We regard the case of *In re Celestine*, 114 Fed. Rep. 551, in point, and under that case and the usual construction given to the foregoing statute we contend that the District Court of the Eastern District of Washington, Southern Division, had no jurisdiction of this case, and that there is no authority upon the part of the Secretary of the Interior to maintain it, and therefore that it should be dismissed.

3.

By the sixth and seventh assignments of error we raise the question that the officers signing the so-called statement or alleged agreement dated on the 21st day of October, 1905, had no authority to enter into and bind the appellant corporation thereby; nor had the corporation authority to bind the stockholders.

The defendant was organized by the farmers to distribute water to themselves (R. p. 89). The stock represents water, there are no profits, the water is distributed solely to shareholders, and the company is a distributing agency (R. pp. 95 and 96). The manner of increasing the stock and distributing the water, etc., is accurately and interestingly given by one witness without contradiction (R. pp. 142-143, 154-6, 158-160, and 161-163). The by-law (R. p. 163) does not change the condition, and it is evident that it was adopted in the forma-

tive period of the company before its real policy and status was settled. The fact is without dispute that water is distributed alone to shareholders on the basis of their stockholdings. It is a mutual water company.

Mutual water corporations are organized for the express purpose of furnishing water only to shareholders thereof, and not for profit or hire, and are not subject to public regulation. They are managing or distributing agencies for their shareholders. Their main purpose is the same as that of voluntary, unincorporated associations.

3 *Kinney on Irrigation and Water Rights*, Sec. 1480, p. 2659.

2 *Wiel on Water Rights* (3d ed.), Sec. 1266, p. 1170.

The shareholder owns the water right to a proportionate amount in the canal, and the share of stock is merely the evidence of his title.

3 *Kinney on Irrigation and Water Rights*, Sec. 1483, p. 2663.

2 *Wiel on Water Rights* (3d ed.), Sec. 1268, p. 1173.

George vs. Robison, 63 Pac. 819 (Utah).
40 *Cyc.* 832, b.

It has recently been held that the directors of a mutual water company have no authority to release

or surrender any part of the physical property of the company, or to divert away from the ditch and waste any of the appropriated water of the company.

Stuart vs. Davis, 139 Pac. 577 (Colo.).

In an action to enjoin a private corporation from converting water the court has no power to adjudicate the rights of individual stockholders in the corporation who were not parties to the suit, their individual rights not being involved in the issues.

Caviness vs. Le Grande Irrigation Co., 119 Pac. 731 (Or.).

While the defendant here is organized under the general corporation laws of the state, yet its character has become fixed by the very object of its organization, its method in the transaction of its business, and its practice and policy from the moment the organization was designed down to the present moment. No money dividends have ever been declared, no profits were ever sought, and no water has ever been delivered to any person other than a shareholder. The certificate of shares represents the interest of the shareholder in the whole flow of the canal in the proportion that his shares of stock bear to the whole number of shares. The appropriation of the water was made by the corporation constructing a canal, diverting the water from the river, and carrying it to the ditches of the shareholders, from which source the shareholders com-

pleted the appropriation by applying the water to their lands. The directors and other officers of the company are wholly without power to deprive the shareholders of water thus appropriated and applied. No one would doubt for an instant that the directors would be without power to alien the whole of this property or any such part of it as would interfere with the proper carrying out of the purposes for which the water was appropriated. Neither can they agree to donate or make a gift of such property. Neither can they agree for or without consideration to abandon to the public any portion of the appropriation needed by the shareholders.

> "The office of the directors is to *manage* and not to *give away* the assets of the corporation. They have no power, by giving away its funds, to deprive it of any of the means to accomplish the purposes for which it was organized."

3 *Thompson on Corporations*, Sec. 3995.

Ultra vires acts of directors do not bind the corporation or the stockholder, unless ratified, or unless circumstances of equitable estoppel exist.

3 *Thompson on Corporations*, Sec. 3999.

The corporation, by operation of law, is under contract with its stockholders to hold and manage the property and affairs of the corporation for the objects and purposes for which it was created, and for no other purpose.

2 *Clark and Marshall on Private Corporations*, Sec. 539.

Rocky Ford etc. Co. vs. Simpson, 36 Pac. 638.

The alleged agreement executed by the officers of the corporation bears date October 21, 1905. On December 21, 1905, at a called meeting of the stockholders of the Company, it was resolved to hold a called meeting on January 2, 1906, to discuss the subject matter of this agreement, and the sense of the meeting was found to be against the concession of any water rights (R. pp. 232-233). The called meeting was held on January 2, 1906, and a resolution was adopted that no action be taken to relinquish any water, which resolution was carried unanimously. Nor did the matter rest there. The Company notified the officer who had conducted the negotiations for the Government that it refused to be bound by the signed alleged agreement (R. p. 140). None of the stockholders ever assented to the alleged agreement after they had learned of it and its effect (R. pp. 147-148, 167.168, 171).

It is a conceded fact in the record that the alleged agreement was not recognized by the Company or its officers and that the defendant continued to carry water to the full capacity of its ditch, and to deliver at its distributing head gates 4,000 inches of water according to its unit of measurement. The record bristles with this fact and condition. One further reference only will be made at this point (R. pp. 255, 267, 268). The act of the officers was not rati-

fied, but expressly disaffirmed, and the corporation and its shareholders did not, either by affirmative action or by laches, create any estoppel.

4.

For the purpose of argument we will consider the eighth, ninth, tenth, eleventh and twelfth assignments of error together. The United States has called the writing in question an agreement. We call it a statement or declaration of the rights of the appellant in and to the water of the Yakima River. It certainly is not an agreement. In its title, relinquishment is made to run to the public. This statement contains words which can indicate nothing else than that the Government does not seek thereby to appropriate any water released by the appellant, but that it is to rely upon the surplus waters of the flood season, which it proposes to store. Upon the face of it it shows that it was not intended that there should be any relinquishment of any water actually used.

The United States gained nothing in the way of transfer of water, nor was it seeking a grant of water, so that the United States was neither injured nor profited by the amount stated in the alleged agreement signed by the appellant, only insofar as there was a definite ascertainment of appropriated rights. As shown by the record, the mistake of a few second feet, while a great damage to the appellant, was of no detriment to the United States. The rights

of the United States, other than those purchased from the Washington Irrigation company, were based solely upon stored water. To these waters the defendant does not now and never has had any claim, though it claims its rights are superior to the rights of the Washington Irrigation company, as the appropriation of that company is subsequent to the appropriation of the appellant by several years.

In 1889 the record discloses that there were but few appropriations of water from the Yakima River, and in that year the farmers owning in small tracts of from forty to one hundred sixty acres the seven thousand acres of land irrigated by appellant croporation, concluded that they would construct this canal of sufficient size to irrigate this entire body. (R. pp. 90, 91).

The contracts for the construction of the canal and flumes call for the identical dimensions and capacity which the canal now is, and which it was in 1905. (Defendant's Exhibit 2.) R. pp. 94, 224 to 227). They began to take water from this canal in 1890, and in 1891 they had sufficient (R. p. 101). The United States cannot base its claim upon any priority, because none is alleged and there is no proof of any.

The stipulation shows that the Sunnyside Canal's first notice of appropriation was made in September 1890, and an amended appropriation in 1891. There is scattered throughout the record evidence showing that long prior to 1905 the farmers who constructed

the West Side irrigating ditch had placed seven thousand acres in cultivation, the amount now in cultivation, and applied to the beneficial use thereof the full amount of four thousand inches. Attention is called to plaintiff's Exhibit E, being a report of stream measurements for 1904, p. 111, where it is stated in the mdidle of the page that the irrigated area under this canal was then seven thousand acres, and on page 109 of the same document it is stated that the company is a co-operative association so the United States, through its Reclamtaion Service had full knowledge of the status of the appellant corporation. During the years of 1903 and 1904 the canal was not operated to its full capacity, because of numerous breaks and repair work.

In the year of 1905 on account of weak banks caused by late reconstruction and the filling in of the canal, the canal did not carry the full appropriation. The examination, however, of plaintiff's exhibits I and P disclose that some dates that year, the canal was carrying as high as 76 7-10 second feet, (which was much less than its normal capacity, because of weak banks that year) as disclosed by the record.

When this statement was made by Mr. Stevens, as Vice President of appellant company, the Government knew, because it was doing business through skilled engineers, that after making allowance for seepage, a diversion at the intake of the canal of 80 second feet of water would supply the

land of the users of water from the canal less than a half inch per acre, and that the hay and grain lands of that valley could not be profitably farmed with that volume of water and that every decree rendered in that valley in the last quarter century has permitted the use of one inch per acre as necessary.

The volume at all times remained the same size, from the first work in 1889, and the change in the head gate in 1909 did not increase the capacity of the ditch. (Ellison, R. p. 224).

The condition of the canal in 1904 and 1905 is shown on R. pp. 262 and 263. We have the repeated statements in the record of W. A. Stevens, Mitchell Stevens, J. N. Burch, Jeff H. Lee and H. G. McNeal that the capacity of the ditch was not increased in 1909, as well as the ever-present fact that the canal was originated to irrigate seven thousand acres and that it flumes had been of unvarying dimensions, and that seven thousand acres had, prior to the year of 1905, been irrigated from it. Now this being the situation, is it reasonable to believe that the farmers under this canal or that the officers signing this statement intended to give up any part of the water that made their land valuable when it will be seen that they had a first right to water sufficient to irrigate it to the fullest extent and had a ditch large enough to carry the water? Why was this statement made that the appropriation of the West Side Irrigating company was during the time mentioned

to be 80 cubic feet per second? Does the court think that these people intended to relinquish any water they needed? In view of these conditions, how shall we construe this act?

We contend that the proper construction of its was that Mr. Stevens intended in behalf of the company of which he was Vice President, to declare to the United States and the public generally, that the appellant would not take any more water from the river than it could actually put to a beneficial use upon its lands, and carry through its flumes, and he erroneously believed this was 80 second feet, and we insist that this was not in the nature of an agreement and we also insist that the acts of the United States afterwards in expending money, was not a consideration for this act, and was not intended so to be.

We think that this act or declaration of Mr. Stevens' assuming that it is binding upon the corporation, which we deny, or upon the individual owners of land under the ditch, which we deny , amounted to a declaration in the nature of an abandonment founded upon a mistake, and which was never acted upon by anybody to their injury, including the United States.

In fixing the amount at eighty second feet we think that there is unmistakable proof that it was believed by Mr. Stevens and his associates that the eighty second feet of water equaled four thousand inches of water in accordance with their own peculiar meas-

urement, and we think that the Government officer, or whatever engineer reduced the amount of four thousand inches to second feet, assumed, without examining closely into it, that the measurement of the Appellant was the ordinary measurement under four inches pressure over the center of the opening.

Measured under a four inch pressure *over the center of the opening*, fifty inches so measured does equal one cubic foot per second of time, and this undoubtedly was the measurement which the engineer of the Government assumed to be the measurement of the Appellant when the engineer reduced the four thousand inches to eighty second feet, but the Appellant's canal company, while probably thinking it had adopted the measurement of water under a four inch pressure had adopted and were using an entirely different measurement.

It has been described heretofore in the language of Mr. Anderson, the engineer, and will be found as described by him on p. 109 of the Record, and on p. 111 of the Record he reduces four thousand inches as measured in this way to second feet, making it ninety and four tenths second feet. Now it will be remembered that Mr. Anderson's testimony is not disputed. No one else has described the manner in which the Appellant actually measures water, but Mr. Anderson, and his computation showing that four thousand inches measured in accordance with Appellant's measuring boxes equals ninety and four-tenths second feet is not in any way disputed.

The difference between these measurements, that is, the measurement under four inches prssure above the center of the orifice and the measurement of Appellant is this: In the module in use by the West Side Irrigating Company the pressure is measured four inches from the top of the orifice, while in the measurement under four inches pressure, which makes fifty inches equal one cubic foot, the pressure is measured from the center of the orifice.

One of the things that clearly demonstrates that there was a mistake in fixing the amount of water is the fact that this eighty cubic feet per second, measured at the intake in accordance with the lower court's decision would have left the water users short of their needs. It cannot be conceived that a body of farmers who have struggled as these men have to obtain valuable property would give it away without any consideration.

Mr. Anderson, on R. pp. 113, 114 and 115, testifies to the loss by seepage from Appellant's canal, and on R. p. 116 he shows that the loss by seepage is fourteen second feet. The exact language of Mr. Anderson is as follows:

(Testimony of E. I. Anderson.)

The records that I have been citing you are the results of the twelve observations in this canal. The results of the twelve observations show that in the manner in which they were distributing water in their canal, that in order to deliver four thousand

inches of water at the head of the various laterals there it would require about 102—as the figures are here—102.1 second feet to be diverted from the river to do that. The result of thirteen investigations carried along the same line gave a result of 104 second feet to be taken from the river.

Q. Mr. Anderson, from your knowledge of the country there, the formation and so forth, where does this seepage water go to; where must it necessarily go?

A. It must find its way back into the river.

Q. In the Yakima River?

A. The Yakima River. No question about it.

It will also be seen that the 14 second feet seepage runs back into the river and certainly it is unjust to the appellants under the circumstances not to credit this amount to them; if they are only entitled to 80 second feet at the intake they certainly should be credited with this 14 second feet that runs back into the river. This is not lost to the Reclamation Service for the reason that it runs back into the Yakima River 40 miles above the intake of the Reclamation Service's two largest projects; The Sunnyside Canal and the Wapato project, and therefore this water is used by the Reclamation Service in its Sunnyside project and its Wapato project, yet the appellant is deprived of it and it is charged against its rights.

Now, we beg to be pardoned for diverting at this

point for a moment to remark that in view of the public spirit evinced by the appellant corporation in so magnanimously agreeing to a declaration of their rights and taking into consideration the child-like simplicity in which they placed their confidence in the Governmental Agencies, we think that it is extremely harsh now for so strict a rule to be invoked against them as is invoked in this decree of the lower court, to not at least credit them, out of their meagre 80 second feet, with the 14 feet which directly runs back to the river, and we can't think that the equity which we so much revere, when thoroughly considered by this court, will permit of any such decree continuing in this case.

Now returning again to the direct question under consideration, Mr. Noble, the Government engineer, told these people that 80 second feet was the equivalent of four thousand inches. It was their purpose to hold all water which they had actually appropriated and needed (McNeal R. pp. 75, 76; M. Stevens, pp. 84, 85, 86; Lee, pp. 115, 116, 117).

Q. Would 80 second feet, as you afterwards came to understand it, supply your needs and appropriation?

A. No, sir.

Q. Was there any intention on your part or the part of any one else to limit yourself to any less water than you were entitled to?

A. No, sir. We did not think we were giving away any water. (R. p. 85).

It was in the year 1906, or possibly 1907, that Mr. Noble notified the ditch company that they must not divert more than the amount stated in the agreement. In the meantime the company had learned of the mistake and declined and ever since have declined to abandon any use of the water (R. pp. 87, 88).

"A. We only knew of measuring laterals where the water was being taken from the canal. Never had in mind taking readings anywhere else.

Q. And what was your understanding of the amount you were to have at those places?

A. We were to have 4,000 inches, what Mr. Noble agreed to give us, as we understood it, and at that time I had never heard of a miner's inch or an inch per second and as I understood it at this meeting we was to get 80 cubic feet per second which represented 4,000 inches measured out to us at all times." (R. p. 115).

"Q. What Mr. Noble said was that he wanted to ascertain the actual needs of the people who were irrigating from the river, is that it?

A. That was my understanding.

Q. And that they had to find out what the different irrigators were going to insist upon before they could go ahead with their work?

A. No, sir. He didn't seem to be at all particular; he wanted to know only approximately so that

they might go ahead with their work." (R. p. 118).

Mr. Lee, who gave the last above testimony, was one of the defendant's trustees at the time the agreement was made. Mr. Stevens was the Vice President who signed the agreement.

It is a well-settled rule, that in suits for the enforcement of agreements, parol evidence and mistake may be offered defensively, and the defendant may show that through the mistake of both or either of the parties, the writing does not express the will of the agreement, or that the agreement itself was enterd into through a mistake as to its subject matter or as to its terms.

2 *Pomeroy's Equity Jurisprudence*, Sec. 860, p. 1192.

Exhaustive note to

Rudisill vs. Whitener, 15 L. R. A. (N. S.) 81.

Murray vs. Sanderson, 62 Wash., 477, and cases cited at 481.

Now, discussing the alleged agreement or as we call it, statement, from the view point of its being considered as an abandonment, the appellant's appropriation during the months mentioned being a diversion of 80 second feet at the mouth of appellant's canal, the effect of this would be that appellant's officers abandoned 10 4-10 second feet of water for use and 14 second feet to cover the loss by seepage, so that the appellant would receive only 66

second feet at the mouth of its distributing canals or making a total loss of more than 24 second feet out of 90.4 second feet. No such abandonment was certainly intended. These farmers and the officers certainly did not intend to do anything which would prevent them from using the amount of water which was required and for which they had, at great expense, constructed flumes and a canal bed to carry.

Our supreme court, in the case of Wendler vs. Woodward, not yet reported, but found in 52 Decisions, No. 2, p. 4, has decided that abandonment is a question of fact and intent. Certainly the appellant did not intend to abandon their needed water, for the effect of this would be to render part of their lands worthless, and to cause a loss of the construction of their ditch to the size that was necessary to carry the water which they needed, because much smaller flumes, therefore much less expensive flumes would carry the water given to them under the decree of the lower court.

The facts show that after this alleged agreement was entered into they went on using all of the water they needed, so as a matter of fact they didn't abandon it. Therefore, in this case we neither have the fact of the abandonment or the intent to abandon, and we think that if nothing else were in this case to cause a reversal of it, a careful consideration of the law of abandonment as applied to water rights, and the facts in this case, would demonstrate to the court that there never was any abandonment.

We invite the court's attention carefully to the law of abandonment as applied to water rights:

An abandonment is an intentional relinquishment of a known right. It is the relinquishment of a right by the owner with the intention to forsake or desert that right.

2 *Kinney on Irrigation and Water Rights*, Sec. 1101, p. 1979, and cases there cited.

1 *Wiel on Water Rights*, (3 ed.) Sec. 567, p. 604.

"To constitute an abandonment of a water right, there must be a concurrence of the intention to abandon it and an actual failure in its use."

Hough vs. Porter, 51 Or. 318.

"Abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region."

Miller vs. Wheeler, 54 Wash. 429.

An abandonment is always voluntary, and a question of fact.

1 *Wiel on Water Rights*, Sec. 567.

Where the preponderance of the evidence in any particular case shows that the appropriator con-

tinued in the use of his rights, no abandonment will be decreed against him by the court. The evidence in any particular case where an abandonment is decreed must be clear and satisfactory if such, in fact, was the case.

2 *Kinney on Irrigation and Water Rights.* Sec. 1116, p. 2013 and cases there cited.

Of course, wherever the defandant's mistake was induced or even made possible by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such an error prevents an enforcement of the agreement. Such co-operation in the mistake, however, is not at all essential. A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proven in defense. This is, indeed, the very essence of the equitable theory concerning the nature and effect of mistake.

2 *Pomeroy's Equity Jurisprudence* (2d. ed.) Sec. 860, p. 1193; Sec. 863, p. 1211.

Recurring to the effect of this declaration or alleged agreement, we invite the court's attention to the fact that the instrument does not state where this water is to be measured and in view of the important bearing because of the great seepage in the canal, of the place of measurement, we think that the uncertainty is so great as to prevent the declaration or alleged agreement from having any effect

whatever. The parties' minds never came together on the amount of water for this reason.

The court arbitrarily fixed in the decree, the measurement without any proof of seepage, either above or below it. It is plain that neither parties ever intended the water being measured in this place, or ever agreed upon it being measured there, for there was no agreement upon the subject. The appellant had been measuring its water in its canal exclusively at the intakes of the laterals.

The Government had measurements upon the canal during 1904 and the irrigating season of 1905 as follows: It had one at the Gordon flume, a mile from the intake at the river, and it had a gauging station at Lachman's place about three miles from the intake.

There was no measurement ever taken at any time by anybody, at the place where the court finally determined that the water should be measured. As a matter of fact not appearing in the record, the place of measurement is in the brush above the Gordon flume, which would mean a greatly increased loss to the water users, beside the added expense of constructing a measuring flume.

As illustrating the general uncertainty and lack of knowledge of the water users of the effect of this alleged contract or declaration, and their ignorance as to the meaning of second feet, we quote a few excerpts from the testimony of the water users. Thus, Mr. H. G. McNeal says:

"We supposed that this second foot amounted to the same measurement that we were already using. I don't know anything about measuring water in second feet at all." R. pp. 135 and 136.

Jeff H. Lee, one of the water users and stockholders, says:

"We only knew of measuring water at the laterals where the water was being taken from the canal; never had in mind taking readings anywhere else. We were to have four thousand inches, what Mr. Noble agreed to give us, as we understood it at that time. I never had heard of a miner's inch or an inch per second, and as I understood it at this meeting we were to get 80 cubic feet per second, which represented four thousand inches measured out to us at all times." (R. pp. 166 and 167).

The same witness on p. 169 said that he understood that Mr. Noble made the paper to ascertain the actual needs of the people who were irrigating from the river. And Mitchell Stevens, the Vice-President who signed the declaration or alleged agreement, on p. 97 R. testifies:

"Q. Did you or your company ever deal in water according to second feet basis?

A. No, sir.

Q. What was the term you always used relative to water?

A. Inches—miner's inches, I think.

Q. Miner's inches?

A. Yes sir.

Q. And then you adopted a box, and whatever that measured you called that inches?

A. Called that inches, yes sir; that is all we knew."

And again, Mr. Stevens testified on pp. 138 and 139 of the record as follows:

Q. Now, upon what were you proceeding when you put in there the term "eighty second feet," and how you came to limit yourselves to that amount.

A. Well, we had been led to believe that 80 second-feet was equivalent to four thousand inches of water as we measured that water.

Q. And therefore instead of using the term four thousand inches you used the term eighty second-feet? A. Yes, sir.

Q. Under that construction to you?

A. Yes, sir.

Q. *Would eighty second-feet, as you afterwards came to understand it, would that supply your needs and appropriation? A. No, sir.*

Q. Was there any intention on your part or the part of anyone else to limit yourselves to any less water than you were entitled to?

MR. BURR.—We object to the question as leading.

A. No, sir. We did not think we was giving away any water. The stockholders had understood, or at least I [86] understood, I can only speak for myself, that we were entitled to four thousand inches of water from the river—that we were entitled to use four thousand inches of water measured out to us, as we understood water measurements. That was our idea of this matter. *We had always, for years and years, had always understood we were to have four thousand inches of water,* that that amount of water would *be necessary to irrigate our land.*

Q. Where were you measuring the water, at what point?

A. At our laterals, where they left the ditch.

Q. Had you any measuring box at the head of your canal? A. No, sir.

Q. Had you any knowledge as to the amount of water that came in or means of measurement?

A. No, sir, we did not know how to measure it.

Q. Were you present when Mr. Anderson was testifying here, or had you come in at that time?

A. No, sir.

Q. Those measuring-boxes which Mr. Anderson observed and examined when he was there in 1912

and 1913, did they or did they not fix your unit of measurement—in other words, was that the way you were accustomed to measuring water?

A. Yes, sir. That is the only measurement we knew.

The 13th and 14th assignments of error will be discussed together. The argument presented as to the first assignment of error applies here. The record no where discloses that the United States had performed the conditions of the alleged agreement to such an extent that it needed this water and it is not shown that a single acre of land irrigated from its constructed project had suffered on account of the loss of water because of the act of the appellant in using the water which it is admitted it used in excess of eighty cubic feet at the intake, as provided in the decree of the lower court. Not a single water user under any of the Reclamation projects testified that he had ever suffered for the want of water at any time.

The rule that applies to controversies between individuals applies here. It is well established that in order that an appropriation of water may be sustained, that there must be an intention to appropriate a certain quantity of water and that this quantity must be actually used or there must be the exercise of reasonable diligence in preparing the land for its use. The cases sustaining this doctrine are numerous, the latest being *Colburn vs. Winchell*, 93 Wash. p. ——; 51 Advance Dec. 254; 160 Pac. 1052.

The only water being furnished by the Reclamation Service at the present time or at any time since its creation in the Yakima Valley, is that which is furnished to the Tieton unit, and that which is being furnished to the Sunnyside unit. That furnished to the Tieton unit comes out of the Tieton River, which through the Naches River flows into the Yakima, just above the city of North Yakima, and some forty-seven miles down the Yakima River from the intake of appellant's canal. The Sunnyside unit comes out of the Yakima River below the city of North Yakima, and over fifty miles down the river from the intake of appellant's canal.

The Sunnyside unit has an appropriation from the natural flow of the Yakima River of 650 cubic feet per second, to irrigate forty thousand acres of land. Originally the Washington Irrigation Company filed an appropriation of 1054 second feet from the Yakima River, but said Washington Irrigation Co. agreed with the Reclamation Service prior to the time the Reclamation Service purchased its rights, to limit its appropriation to 650 second feet. For all of the above statements see R. p. 62, being a stipulation between the plaintiff and defendant as to certain facts.

At fifty inches to a cubic foot per second this would give the Sunnyside unit 32,500 inches of water under a four inch pressure, which would be approximately an inch to the acre. The 80 cubic feet awarded to the appellant by the lower court,

even if all of it were run into the laterals of the water users, would aggregate upon this basis, four thousand inches, or a little over a half inch per acre to the seven thousand acres of land required to be irrigated; or putting it another way, appellant would have to have 113 second feet at its intake to equal the Sunnyside reservation of 650 second feet.

And here we wish to call the court's attention to this comparison, and it shows of itself that there was a mistake on the part of appellant and the Government in fixing 80 cubic feet as the amount used by the appellant; therefore we contend that upon the evidence the Government has not made out a case for injunctive relief.

The use which the Government proposes to make of this water is the identical use which the water users of the appellant have been making of it since 1889 and to deprive them of that use is to work an injury to them without any corresponding benefit of the Government. The Government practically seeks to take away one fourth of the appropriation necessary to irrigate the land of the stockholders of the appellant and the effect of this is to deprive them of one fourth of their outlay and efforts for a period of more than a quarter of a century, and to bestow their appropriation upon those who are yet to contract with the Government; and besides this, it decreases the value of their land to the extent of one fourth, because these lands are of no value without water and if this decision is affirmed, at least one

fourth of this seven thousand acres of land owned by the stock holders of the appellant will again become a desert.

6.

The 15th assignment of error raises a question peculiar to the property rights in the state of Washington, relating to husband and wife. Section 5918, Remington & Ballinger's Annotated Codes and Statutes of Washington is as follows:

> "The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon. (Cd. '81, 3410; 1 H. C., 1400)."

Under this statute it has been held in many cases beginning with the case of Holyoke vs. Jackson, 3d Wash. Terr. 235, that a husband can not in any way affect the title of the wife to real propery, without

she joins in the conveyance or in the act by which property is conveyed. Among the first cases of the Supreme Court of this state on this point is the case of *Graves vs. Smith*, 7 Washington, 14.

There has been no testimony here showing that any of the wives of any of the water users or any of the owners of this seven thousand acres of land have in any way acquiesced in the release to the Government of any of the water that was ever at any time appurtenant to the said lands. It needs no authority to sustain the proposition that water is an appurtenant to irrigated lands. Therefore, if this alleged agreement is given the effect claimed for it by the United States, it is void because it is not shown that the wives of the stockholders of this corporation have in any way consented to such a relinquishment, or in any way ratified the same.

7.

We will discuss the assignments of error from the 16th to the 24th inclusive, together, as they more or less are connected with each other. More or less argument heretofore, applies to each of these assignments, and will not be repeated, as a party dealing with an agent must, at his own peril, learn his authority, the United States in this case must be regarded as knowing that the trustees did not have authority to make any agreement releasing the rights of the water users and land owners for whom the appellant carried water. The appellant was simply a carrier of water. The appropriators of

water were the owners of the land. Had the stockholders ratified by silence even, the act of appellant's officers, authority for their acts would have been inferred, but the acts of the officers in signing this alleged agreement were promptly disaffirmed; and it must be remembered that no benefits were received by appellant and therefore nothing had to be returned before the act could be disaffirmed.

The alleged agreement purports to have been signed on October 21st, 1905. It is shown in the testimony on R. pp. 146, 147 and 148 that on December 21st, 1905, at a meeting of the trustees of appellant and officers, a resolution was passed declaring that the sense of the meeting was found to be against any concessions of water rights to the Government, and a general meeting of the stockholders was called for January 2, 1906. Such a meeting was held on January 2, 1906, and the following resolution was passed.

> "Moved by W. A. Stevens and seconded by Goodman, that no action be taken to relinquish any water at this time."

Certainly this shows that the stockholders were not ratifying any unauthorized act of its trustees or officers. If this alleged agreement between appellant and the public is to be of any effect it must have the effect of either conveying or relinquishing an interest in real estate.

While usually a corporate seal is not required to

simple contracts, the law of the state of Washington requires any instrument of a corporation to be witnessed by the official seal of an officer. Remington & Ballinger's annotated codes and statutes of Washington, Sec. 876½, is as follows:

"Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

State of .....)
} ss.
County of .....)

On this .....day of....., A. D., 19..., before me personally appeared ....., to me known to be the (president, vice-president, secretary, treasurer or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my *official seal* the day and year first above written.

.....
(Signature and title of officer).

It will be seen that under this statute the alleged agreement is of no force or effect, and is not binding upon the corporation.

In addition to what has been said and referred to in connection with the misunderstanding of the parties to this arrangement, we wish to call the court's attention to the testimony of Mitchell Stevens, found on page 138 of the record:

> "Q. Would eighty second feet, as you afterwards came to understand it, would that supply your needs and appropriation?
>
> A. No, sir.

And again on page 139 in answer to a question stated the following.

> A. We had always, for years and years, had always understood we were to have four thousand inches of water, and that that amount of water would be necessary to irrigate our land.

And on page 140, again stated:

> A. We were notified by Mr. Noble that we had to accede to the amount of water that we had been limited to and he left instructions to turn that water off. We found out that we would have less water than we were using and we refused to do it."

And again, as to what W. A. Stevens says, see Record, page 97:

Q. The unit of measurement that you used was the inches measurement?

A. The same as was used on the Manashtash.

Q. I will ask you this question; from your knowledge and long acquaintance there on the West Side and knowledge of the conditions is the amount of 4000 inches according to the measurement of inches which you use, a needed amount when measured out through the measuring box, taken out of the canal, a necessary amount for the proper irrigation of this land lying under the canal?

A. I doubt very much if it is sufficient amount to irrigate all of the lands when put under cultivation.

Q. You doubt that it is sufficient? Then your answer would be that the full amount of 4000 inches measured at that place and in that manner is necessary?

A. You mean through our measuring boxes?

Q. Yes.

A. Oh, yes sir.

On page 111 the testimony of E. I. Anderson:

Q: How many second feet would four thousand inches measure under these farmers' way of measuring, what amount of inches converted into second feet?

A. I don't know whether I can answer that off hand or not. I think I can find it in the report here.

Q. Yes, refer to your report and find your figures.

A. The value of four thousand inches, as measured by the West Side Irrigation company in the distribution of water in the operation of their canal is the equivalent of 90.4 second feet, according to the calibration of their boxes."

And again, to the testimony of H. G. McNeal, page 129 of the record:

"A. Well, my understanding was that the 80 cubic feet was the equivalent of four thousand inches of water, the equivalent of four thousand inches as we measured water.

Q. How was that?

A. The 80 cubic feet we were told by the Government was the equivalent to four thousand inches of water as we measured water.

Q. How did you measure it?

A. The only place we measured it was at our various measuring places where we delivered water.

Q. That is, as I understand you, by this term of 80 second feet or 80 cubic feet, you intended to limit your appropriation from the Yakima

River to the actual amount of water that you had been using through your canal?

A. Yes sir, not to exceed four thousand inches at the low stages of water."

Now, in conclusion, and particularly in summarizing the views from the foregoing, this alleged agreement is unconscionable if it is given the effect that the lower court gave it. We call the court's attention to the following fact, that

This suit is not brought for the purpose of establishing a priority, wherein he who is first in time is first in right. The bill of complaint discloses that it is, in effect, a proceeding for the specific performance of a contract, through a decree requiring the defendant to perform the agreement alleged. All rights, equities and titles are claimed to have been merged into this agreement and its specific performance is claimed. It is charged that the defendant has diverted and is diverting large quantities of water in excess of the amount fixed by the agreement, and will continue so to do to the great and irreparable damage of the plaintiff. (Paragraphs VIII and IX of amended bill of complaint.) It is charged that plaintiff can make, and, under the withdrawal and authorization fixed by the act of the legislature, is making beneficial use of the natural flow of the river, by delivery thereof to persons and corporations contracting with *and to contract with plaintiff*. (Paragraph X.) It is nowhere urged, alleged, claimed, asserted or established,

either in pleading or in the evidence, that the defendant was not entitled to the full amount of water which it was diverting at the time of the commencement of this suit. It is not alleged that on the 21st day of October, 1905, the defendant was not entitled to a greater amount than the 80 second feet set forth in the agreement, but only that it limited itself to that amount.

That the alleged agreement made by the officers of this company is an unfair and inequitable one, and would not have been entered into by them except through mistake and ignorance of their rights, cannot be doubted; and that the relief here sought is harsh and oppressive upon the defendant and its stockholders, is beyond just dispute. If we were dealing with private parties as adversaries, we would not hesitate to charge that by concealment and by undue advantage of a situation an unconscionable agreement was affected. But waiving such a charge and under the circumstances here, it is no answer that the contract is not illegal, and that no defense could be set up against it at law, or that it possesses no features or incidents which would authorize a court of equity to cancel it upon full execution, but rather, where specific performance is sought, as here, plaintiff must come into court asking for such relief as will not be oppressive or work injustice.

> "He who seeks equity must do equity. The doctrine, thus applied, means that the party

asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant; * * * and when the contract itself is unfair, one-sided, unconscionable or affected by any other such inequitable feature, and when the specific performance would be oppressive upon the defendant or would prevent the enjoyment of his rights or would in any other manner work injustice, specific performance will always be refused."

1 *Pomeroy's Equity Jurisprudence*, Sec. 400, p. 544.

If there were present here, on the part of the defendant or its stockholders, an intent to speculate or a purpose to derive an unfair advantage, or any act which runs counter to the wholesome conduct and purpose of many years, then the equities would be different. Or, if the unimpeachable facts did not show a valid appropriation with no intent to abandon it, and a careless yielding to the beguiling and plausible estimate of a promoter of a government enterprise, then the contention we are now making would not be seriously urged. If the contract was a legal one, and if it had been made understandingly, and if it had been made upon a just consideration, and if its non-enforcement would work an injury to those with whom the contract was

made, then its one-sided and unfair character would not exist. But in this matter no advantage was to accrue to the stockholders of this company, since they only desired to co-operate on fair and equal terms with the government of the United States. In the language of one witness, the people of the valley were enthusiastic because Mr. Noble stated that large works would go forward if they could get to an understanding of how much water belonged to those living below the West Side canal, and the amount of water it would be necessary to store at the lakes. (R. p. 167.) And now, after mistake has been made in the carrying out of their generous views, this contract is sought to be held against them without the United States extending the same generous consideration in return.

To hold these people to 80 second feet of water at the mouth of the canal is to make them stand the seepage, without credit, though it runs directly back into the river. That this seepage does so return is not disputed in the record. It is a physical condition which needs no proof that, in addition to the seepage loss, the water which is stored in the soil by irrigation in a very large measure returns to the river, especially where the irrigation is along the very banks and reaches of the river, as in this case. It is common knowledge that the return flow to the Yakima River from irrigation is of such volume that the lower canals on the Yakima River in Benton County are not required to take into consideration diversions and appropriations above. From

every point of view, the loss to the defendant is great and immediate, if the prayer of the complaint be granted, while the benefit to the plaintiff is doubtful, indirect and may never occur.

The complainant must come in with clean hands; and a contract will not be enforced when equities exist on the other side which would render it unjust to grant the relief, or where it is not clear that the minds of the parties have come together.

Bispham's Equity, Sec. 376.

"Nor will a court of equity enforce a contract according to its terms, when to do so would be to violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement."

26*Am. & Eng. Enc. Law*, 2d ed., p 68.

Rudisill vs. Whitener, 15 L. R. A. (N. S.) pp. 88-90.

Now, as a final word, we plead with all of the earnestness at our command, that the bill of the plaintiff should be dismissed, or at least that the defendant be not restricted to a less amount than a diversion of 104 4-10 second feet at the Gordon flume, which means a distribution at the intake of the laterals of the appellant of 90 4-10 second feet

of water, which is equivalent to four thousand inches as measured out by the defendant to its stockholders.

Respectfully submitted,

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